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Public Prosecutor v Soha Beta & Anor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(LB)-454–12 OF 2016
HAMID SULTAN, UMI KALTHUM AND ABDUL RAHMAN SEBLI JJCA
17 OCTOBER 2017

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Circumstantial evidence — Prima facie case proven — Whether infant died of asphyxia due to being buried alive or death took place before burial — Penal Code ss 34 & 302

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The respondents were charged under s 302 of the Penal Code ('the Code') read together with s 34 of the Code for allegedly murdering their biological son who was two days old. The deceased was allegedly buried alive by his biological E parents. The dead body of the infant was recovered by the police team. There was one eyewitness who witnessed the respondents entered the plantation carrying a baby and leaving the plantation without the baby. The eyewitness evidence in this case was not one where the identification of the two respondents could be clearly established. The prosecution had relied on F circumstantial evidence to establish a prima facie case. However, at the High Court, the judicial commissioner had ruled that the appellant had failed to prove a prima facie case. The respondents were acquitted and discharged. The issue for consideration by the court was whether the infant died of asphyxia by burying the infant alive or the death of the infant took place before burial.

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Held, ordering defence to be called and setting aside the order of acquittal and discharge:

(1) The appellant had made out a prima facie case and this was a fit and H proper case for appellate intervention. Any reasonable tribunal appraised of the fact and law would have concluded that the ingredients of the offence had been satisfied principally by the pathologist, the security guard, the DNA evidence and direct evidence of hospital staff at the time of birth. The nexus of the infant, the respondents and the cause of death I per se could be said to establish a prima facie case based on direct and/or circumstantial evidence. Further, the close nexus of both the accused to the crime and the fact that the crime was committed would prima facie be sufficient for the prosecution to invoke s 34 of the Code (see paras 7 & 9–10).

[Bahasa Malaysia summary

Kedua-dua tertuduh dituduh bagi kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun yang sama kerana menyebabkan kematian anak kandung mereka yang berusia dua hari. Si mati dikatakan telah dikebumikan hidup-hidup oleh ibu bapa kandungnya. Mayat bayi tersebut telah dijumpai oleh pasukan polis. Terdapat satu saksi yang telah menyaksikan responden-responden memasuki ladang membawa seorang bayi dan meninggalkan ladang tanpa bayi tersebut. Identiti responden-responden tidak dapat dikenalpasti dengan jelas oleh saksi di dalam kes ini. Pihak pendakwaan telah bergantung pada keterangan ikut keadaan untuk membuktikan kes prima facie. Namun, di Mahkamah Tinggi, pesuruhjaya kehakiman memerintahkan bahawa perayu gagal membuktikan kes prima facie. Responden-responden telah dilepaskan dan dibebaskan. Isu yang berbangkit adalah sama ada bayi tersebut meninggal dunia akibat asfiksia disebabkan oleh pengkebumian hidup-hidup atau bayi tersebut telah meninggal dunia sebelum pengkebumian tersebut.

Diputuskan, mengarahkan pembelaan dan mengenepikan arahan pelepasan dan pembebasan:

(1) Perayu telah membuktikan kes prima facie dan ini merupakan kes yang perlu dan wajar untuk campur tangan rayuan. Mana-mana tribunal yang menilai fakta dan undang-undang akan membuat kesimpulan bahawa unsur-unsur kesalahan telah dipenuhi terutamanya oleh ahli patologi, pengawal keselamatan, keterangan DNA dan keterangan kakitangan hospital pada masa kelahiran bayi. Hubungan bayi, responden-responden dan sebab kematian dengan sendirinya boleh dikatakan telah menubuhkan kes prima facie berdasarkan keterangan langsung dan keterangan ikut keadaan (lihat perenggan 7 & 9–10).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Chandmal And Anr v State of Rajasthan AIR 1976 SC 917, SC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (refd)
Ravindran a/l Ramasamy v PP [2013] 4 MLJ 665, CA (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Suresh v State UP 2001 (3) SCC 673, SC (refd)

Legislation referred to

Penal Code ss 34, 302

Appeal from: Criminal Trial No MYY-45B-2/7 of 2014 (High Court, Miri)

Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ranbir Singh Sangha (Ranbir S Sangha & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/public prosecutor appeals against the decision of the learned High Court judge who acquitted and discharged both the respondents of a charge under s 302 of the Penal Code read with s 34 of the said Code.

[2] The said charge reads as follows:

> Bahawa kamu, bersama-sama, pada 26.11.2013, jam lebih kurang 3.30 petang, bertempat di Lereng Bukit, Jalan Ladang Alamwasa Sdn Bhd Suai, Batu Niah, di dalam Daerah Miri, dalam negeri Sarawak, didapati dengan niat bersama melakukan pembunuhan dengan menyebabkan kematian ke atas seorang bayi lelaki (tiada nama) umur lebih kurang 2 hari, oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama dengan Seksyen 34 Kanun yang sama.

[3] What is important to note in this case is the respondents are biological parents of the deceased/infant. Both were accused of burying the infant alive about 48 hours after the birth of the infant. Both were last seen in the hospital with the infant. Subsequently, there was one eyewitness to say that both brought and buried the infant, in the vicinity of a factory where the eyewitness was working in the factory. The dead body of the infant was recovered by the police team. The eyewitness evidence in this case is one where the identification of two persons could not be clearly established and in consequence the prosecution relies on the jurisprudence of circumstantial evidence to establish a prima facie case.

[4] The petition of appeal reads as follows:

> 1. The Learned Judicial Commissioner had erred in fact and in law when His Lordship ruled that the prosecution failed to prove a prima facie case under section 302 Penal Code read together with section 34 of the same Code against the weight of the evidence.
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> 2. The Learned Judicial Commissioner had erred in fact and in law when His Lordship ruled that,
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> > ... I find that the baby was already dead due to asphyxia before he was buried at Ladang Alamwasa on 26.11.2013. I made my finding after reading all the prosecution's evidence and in particular the evidence of PW13, PW18 and PW19 ...
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> 3. The Learned Judicial Commissioner erred in fact and in law when His Lordship failed to consider PW18's evidence that when the deceased baby's body was found

buried it was wrapped in 2 (two) layers of green and white clothing and that would explain why the deceased baby's nostrils and mouth had no soil in it.

4. The Learned Judicial Commissioner erred in fact and in law when His Lordship failed to consider these facts that:-

(a) The deceased baby which was born alive, died under the care of Respondent 1 and Respondent 2;

(b) Respondent 1 and Respondent 2's conduct in burying the baby themselves at the oil palm estate secretly; and

(c) Leaving the burial place in a hasty manner without informing family members or authorities,

whereas, the Respondents need to explain their conduct under section 9 of the Evidence Act 1950.

5. The Learned Judicial Commissioner erred in fact and in law when His Lordship failed to order the Respondents to enter their defence whereas the totality of the evidence adduced shows that a prima facie case had been made out against the Respondents under the original charge.

[5] The basic ingredients for this offence are quite straight forward and the facts of the case will show nexus to the respondents and death of the infant. The debatable issue will only be related to whether the infant died of asphyxia by burying the infant alive or the death of the infant took place before burial. In jurisprudential term related to culpable homicide, this issue may have little relevance. There was medical evidence as well as circumstantial evidence to support the prosecution's case that the infant was buried alive. The respondents may have a different version for the cause of death of the infant and the subsequent burial which may lead to an acquittal or reduce charge but that can only be done at the defence stage. As per the charge, the ingredients of the offence the prosecutor have to establish by direct and/or circumstantial evidence are as follows:

(a) the infant was the biological child of the respondents;

(b) infant had died of asphyxia; and

(c) the respondents with common intention had buried the infant alive.

BRIEF FACTS

[6] The brief facts of the case have been summarised by the learned deputy public prosecutor and, inter alia, read as follows:

(1) The second appellant had given birth to a baby boy on the 23 November 2013 at Miri Hospital. Both the second appellant and the infant were

confirmed fit and healthy. The second appellant and the infant were allowed to be discharged from the Miri Hospital on the 24 November 2013.

(2) Merely about 48 hours after the infant was discharged, the infant was found dead, buried underneath the soil.

(3) Immediately before the discovery of the infant underneath the soil, PW13 had seen the first appellant and a female who carried a baby in a 'kain sarong batik' entering the plantation from the main road facing towards PW13's guard house. PW13 could see the first appellant's face but could not see the face of the female since she was facing down and carrying the infant.

(4) When they reached at the junction near the pond, the first appellant and the female together with the infant made a right turn to the bushes (the place where the infant was found buried) and PW13, from his guard house, could not see what was happening inside the bushes.

(5) After ten minutes; PW13 saw them coming out from the bushes and walking towards the main road. At this particular time, PW13 saw the first appellant washed his hands in the pool of water collected in the tyre track and PW13 saw the female was no longer carrying anything. She was merely carrying an empty sarong and it was the same sarong carried by her earlier.

(6) Later, PW13 heard sounds of infant crying. It was two times and came from the direction of bushes. PW13 went to the said direction for checking and further saw a patch of earth that had recently been dug up and covered with white fertiliser plastic bag that had been used. PW13 used his foot to push the soil aside near the white fertiliser plastic bag but he did not manage to see anything. Then PW13 returned to his guard house to take the hoe. By using the hoe, PW13 tried to remove the top soil slowly and suddenly he saw a leg sticking out from the ground. PW13 saw no movement of the infant.

(7) The police was called to investigate the matter and the infant was brought to Miri General Hospital for post-mortem. Green and White cloths printed with words 'UNTUK KEGUNAAN HOSPITAL SAHAJA' were also found wrapping the body of the infant underneath the soil.

(8) The Miri police managed to trace the appellants somewhere in Bintulu and they were arrested.

(9) Based on this arrest; the police had seized several clothings belonging to the second appellant which had been worn by her during her admission to Miri Hospital and during the commission of the offence, the clothes belonging to the first appellant which had been worn by him during the commission of the offence.

(10) The DNA analysis conducted confirmed that the appellants were the biological parent of the infant. Other than that, the DNA of the infant was also detected on the clothing worn by the appellants during the commission of the offence.

(11) The post mortem of the infant confirmed that the cause of death was asphyxia and the pathologist was of the opinion that if the infant was buried alive underneath the soil, it can cause asphyxia. The pathologist further testified that the act of burying the infant underneath the soil was sufficient in the ordinary course of nature to cause death to the infant and the chance of survival of the infant was 'NIL'.

[7] In the instant case, any reasonable tribunal appraised of the fact and law would have to come to the conclusion that the ingredients of the offence had been satisfied principally by PW19 — the pathologist, PW13 — the security guard, the DNA evidence, direct evidence of hospital staff at the time of birth, etc. The nexus of the infant, the respondents and the cause of death per se can be said to establish a prima facie case based on direct and/or circumstantial evidence. Support for the proposition is found in a number of cases. To name a few are as follows:

(a) in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617, the Federal Court had this to say at para 119, p 653:

> ... in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible.
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> ...

(b) in the case of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195, the accused was charged with the murder of his lover by allowing her to dive in unsafe waters. The prosecution led evidence to show that the accused was a bankrupt and had taken life insurance policies in which the accused was the beneficiary. The accused made a claim with the insurance company within 24 hours after her disappearance. Basing on the circumstantial evidence the court convicted and sentenced the accused to death. The trial judge in his summing up and as quoted by the Federal Court at p 198 stated:

> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example, Was it an accident? ...
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> Now, as I told you earlier on, one of the points about circumstantial evidence

A is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them all, lead you to? Adding them together, considering them not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?

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The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one concluding only: that it was the accused who intentionally caused the death of this young girl.

C (c) the Supreme Court of India, in the case of *Chandmal And Anr v State of Rajasthan* AIR 1976 SC 917 propounded a three-fold test to convict based on circumstantial evidence. The test suggested was as follows:

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

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(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

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[8] It is now well established that when the courts had to decide merely on circumstantial evidence at the prosecution or defence stage it must consider the following, namely:

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(a) every fact or circumstance on which the prosecution relies had been clearly proven;

G (b) the incriminating circumstances must lie incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than the guilt of the accused;

(c) the circumstances from which the conclusion of guilt is to be drawn should be fully established, ie there must be a complete chain of evidence that will not leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must show that, within all human probability, the act must have been done by the accused; and

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(d) the circumstances should be of a conclusive nature and tendency.

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[9] Common intention is a statutory formula and case laws do not require mens rea to be established. The close nexus of the accuseds to the crime and the fact that the crime was committed will prima facie be sufficient for the prosecution to invoke s 34. That does not mean that the defence at the defence

stage will not be able to demolish the allegation and proof of common intention. It all depends on the facts as well as the version of the defence story at the defence stage. There are a number of cases which has dealt with the jurisprudence of common intention. In *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665 Hamid Sultan bin Abu Backer JCA on the issue of common intention had this to say:

> (i) ... s 34 of the Penal Code which deals with common intention is that one need not be the principal offender to be liable for the offence. Association in the crime and failing to show satisfactory disassociation from the crime or principal offender will attract the charge as well as the sentence as per decided cases in this area of jurisprudence.

[10] It is also well settled in relation to s 34 that at times it is difficult if not impossible to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case (see *Suresh v State UP* 2001 (3) SCC 673; see also *Janab's Key To The Law of Evidence* (4th Ed) revised by Dato Mah Weng Kwai).

[11] We were satisfied that the prosecution had made out a prima facie case and this is a fit and proper case for appellate intervention to direct defence to be called and set aside the order of acquittal and discharge.

We hereby ordered so.

Defence called; order of acquittal and discharge set aside.

Reported by Fatin Mohd Ismail